LIBRARY.
SUPREME COURT, U. S.
No. 917

Office-Supreme Court, U.S.
FILED
MAR 11 1963
JOHN F. DAVIS, CLERK

In The Supreme Court of The United States

OCTOBER TERM 1962

FRANK STRANGWAY,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK STRANGWAY
P. O. Box 3072
San Diego 3, California

In propria persona

SUBJECT INDEX

	Page
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
BASIS OF JURISDICTION BELOW	2
IMPORTANT STEPS IN THE TRIAL COURT	3
QUESTIONS PRESENTED	4
First Question	4
Second Question	4
Third Question	5
Fourth Question	5
SUMMARY OF FACTS	5
REASONS FOR GRANTING WRIT	6
CONCLUSION	10
APPENDIX A	11

TABLE OF AUTHORITIES CITED

Page

CASES

Am Ming Cheng vs. US,
300 Fed. 2d 202, 204 8

Anderson vs. US, 30 Fed. 2d 485, 487 8

Bosselman vs. US, 239 Fed. 82, 85 9

Brasfield vs. US, 272 US 448, 449 10

Briggs vs. US, 221 Fed. 2d 636, 638 10

Campbell vs. US, 221 Fed. 186, 188 10

Donaldson vs. US, 9th Cir.,
248 F. 2d 364, 367 6

Holmgren vs. US, 217 US 509, 513 9

M'Ginnis vs. US, 256 Fed. 621, 625 9

Peterson vs. US, 213 Fed. 920, 924 10

Rubenstein vs. US, 227 Fed. 2d 638, 642 . . . 10

CODES

Internal Revenue Code of 1954
Section 7206 (2) 2, 3

USC Title 18, Section 3231 3

TABLE OF AUTHORITIES CITED (Cont'd.)

Page

CODES

USC Title 26, Section 7206 (2) 2, 3

USC Title 28, Section 1254 (1) 2

RULES

Rule 19B, Fed. Rules of Cr. Procedure 10

Rule 30, Fed. Rules of Cr. Procedure 8

Rule 37c, Fed. Rules of Cr. Procedure 2

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

FRANK STRANGWAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 8, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of January 8, 1963, is not reported but is copied in Appendix A, infra.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was dated and entered on January 8, 1963. Petitioner filed a petition with the Court of Appeals for rehearing on the 6th day of February, 1963. On February 12, 1963 the Court of Appeals denied the petition for rehearing.

The jurisdiction of the court is invoked under Title 28 United States Code, Section 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

BASIS OF JURISDICTION BELOW

Petitioner was indicted by the Federal Grand Jury in the Southern District of California, Southern Division, on November 8, 1961.

The indictment contained twelve counts and in all twelve, petitioner was charged with violation of Section 7206 (2) Internal Revenue Code of 1954; Title 26 United States Code, Section 7206 (2). Petitioner was convicted on only count number five of the indictment under which he was charged as follows:

That petitioner ... "did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Director of Internal Revenue for the Los Angeles Internal Revenue Collection

District of California, at Los Angeles, California, of a false and fraudulent income tax return of Ramona E. Rodriguez for the calendar year 1958, in which said return it is represented that the said Ramona E. Rodriguez was entitled under the provisions of the internal revenue laws, to claim deductions and exemptions in the total sum of $3692.00, which was false and fraudulent as the defendant then and there well knew, whereas, in truth and in fact, the said Ramona E. Rodriguez was entitled to claim deductions in the amount of $2236.00 in violation of Section 7206 (2), Internal Revenue Code of 1954, Title 26, United States Code, Section 7206 (2)." Petitioner was acquitted on counts numbered twelve and six while a mistrial was declared as to counts 1, 2, 3, 4, 7, 8, 9, 10 and 11, because of the failure of the jury to agree.

The District Court had jurisdiction of the cause under Title 18, Section 3231, which confers upon the District Court, original jurisdiction of all offenses against laws of the United States.

IMPORTANT STEPS IN THE TRIAL COURT

Following almost two weeks of trial, jury instructions commenced at 9:30 a. m. on Monday, January 22, 1962. (Rep. Tr. p. 384) The jury retired at 10:22 a. m. on that same day. (Rep. Tr. p. 411, l. 25). At 2:25 p. m. the jury returned and requested that testimony be read to them. (Rep. Tr. p. 413, ll. 6-7). The jury again retired at 3:25 p. m. (Rep. Tr. p. 414, ll. 21-22). At 4:25 p. m. the jury was allowed to separate for the night. (Rep. Tr. p. 415, ll. 1-8). The jury resumed deliberations at 9:30 a. m. on January 23, 1962, and at 2:58 on that date, the jury was

given an additional instruction (Rep. Tr. p. 418, ll. 3-25, p. 420, ll. 1-12, p. 420, ll. 17-21).

Application for probation was made on behalf of appellant (Rep. Tr. p. 431, ll. 3-5), and a motion for a new trial was filed January 24, 1962. (Cl. Tr. p. 70). Appellant's motion for a new trial was denied on February 23, 1962, and appellant was sentenced to pay a $5,000 fine at the rate of $100 per month and placed on probation for a term of five years, one of the conditions of probation being that he not engage in the preparation of Federal income tax returns for Federal taxpayers. (Cl. Tr. p. 75).

Notice of appeal was filed February 26, 1962 (Cl. Tr. p. 76). Following a hearing before the trial court on the designation of the record on appeal, the court on June 5, 1962, filed its order re extension of time for filing of record on appeal and designation of record on appeal. (Cl. Tr. p. 82). The appeal was docketed as number 18160.

QUESTIONS PRESENTED

FIRST QUESTION

Was the verdict contrary to the evidence and did the court of appeals err in failing to pass upon the sufficiency of the evidence because only a portion of the evidence adduced at the trial was included on the record on appeal?

SECOND QUESTION

Did the court err in refusing to give appellant's

offered instruction detailing with the manner in which the jury should evaluate circumstantial evidence?

THIRD QUESTION

Did the court commit error in failing to instruct the jury relative to the uncorroborated testimony of an accomplice?

FOURTH QUESTION

Did the court erroneously coerce the jury into bringing in a verdict and further commit error when it asked the jury to consider factors outside the evidence?

SUMMARY OF FACTS

Petitioner Strangway was in the business of preparing income tax returns for Federal and State income taxpayers. The witness Ramona E. Rodriguez was a 55 year old woman, of Mexican descent, who had progressed only to the third grade in school, who is hard of hearing, and who is unable to communicate in the English language without an interpreter and who is unable to add. She testified to a conversation she had with petitioner almost two years before the trial. At the time of trial she denied she had given petitioner Strangway certain items of information which he used in the computation of the deductions and exemptions of her income tax return for the year in question. Petitioner testified that the return was based solely on information given him by the witness.

The record on appeal was designated by the trial court and contained all of the evidence both oral and

documentary, which was introduced on behalf of both the government and petitioner in support of and in answer to the offense charged in count number five of the indictment. The only evidence adduced at the trial that was excluded from the record was evidence offered in support of the other eleven counts of the indictment under which petitioner was either found not guilty or the jury failed to agree.

REASONS FOR GRANTING WRIT

Certiorari should be granted in this case to resolve important questions of law as follows:

1. Concerning the first question raised herein, it is manifestly unfair and unjust to require an appellant in the Federal Court system to pay for the costs of the preparation of the entire record when the entire record might contain vast amounts of testimony and evidence directed solely to counts of an indictment which are not before the court on appeal and which evidence has no bearing on any questions submitted to the court on appeal.

In order to overcome this contention, the government relied on Donaldson vs. the United States for the Ninth Circuit, 248 F. 2d 364, 367. The Donaldson case is not in point and should not control because it is petitioner's contention that evidence was excluded from the record which was offered by the government to convict Donaldson of the very crimes which he later sought to overturn on appeal. In support of the argument that this question should have been decided on its merits, the following excerpts from the testimony of the witness Rodriquez is quoted.

"Q. Now, tell me this, Mrs. Rodriguez: Do you actually remember what you told Mr. Strangway three years ago now?

(The question was interpreted).

A. (In English). Oh, I --".

At this point there was a request by defense counsel that the interpreter explain why he had pointed to Government's Exhibit 5 which was before the witness two or three times while he was translating the question into Spanish. The jury was excused and following a discussion of the matter returned to the courtroom and the question was read to the witness.

"THE WITNESS: (In English) It is such a long time to remember, because I have so many things to work.

MR. ADAMS: May I have that answer read back? I didn't catch it.

THE COURT: Read the answer.

(The answer was read).

Q. Mrs. Rodriguez, would you please answer my question 'yes' or 'no'.

(The question was interpreted)

A. (In English) No, I can't remember. I'm sorry.

Q. Thank you.

A. (In English). I'm sorry, but I can't."

(Rep. Tr. p. 64, l. 25, p. 65, ll. 1-3; p. 66, ll. 3-12; p. 68, ll. 2-15).

2. Concerning the second question raised herein, petitioner offered two instructions dealing with circumstantial evidence. These were numbered defendant's offered instructions four and five. (Cl. Tr. p. 43).

It is appellant's contention that where a case rests upon circumstantial evidence, the circumstances must be so clearly proven that they point, not merely to the possibility or probability of guilt, but to the moral certainty of guilt. In other words, the inferences which may reasonably be drawn from the facts proven as a whole must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence. The jury should have been so instructed. Anderson vs. United States, 30 F. 2d, 485, 487; Am Ming Cheng vs. US, 300 Fed. 2d 202, 204. To say that petitioner did not object to the failure to give this instruction as required under rule 30 of Federal Rules of Criminal Procedure is begging the question. The entire purpose of the requirement that a defendant in a Federal court, charged with a crime, must submit written instructions to the court is for the purpose of notifying the court of the instructions the defendant believes to be applicable to the facts and law of his particular situation. Under the circumstances, when the Judge rejects the offered instruction an objection to this rejection would be an utter, futile and useless act which the law certainly should not require.

3. Concerning the third question raised herein, it is petitioner's contention that the witness Rodriguez was an accomplice as a matter of law.

A conviction may be had in the Federal Courts upon the uncorroborated testimony of an accomplice, if the story, as told, is straightforward and has a ring of truth and indicates unequivocably the guilt of the accused. The court however, in a case where it is sought to convict upon the uncorroborated testimony of an accomplice should cautiously and clearly direct the jury's attention to the exercise of care and caution in viewing such evidence and that the testimony of the accomplice must be convincing proof of the guilt of the accused. M'Ginnis vs. US, 256 Fed. 621, 625; Bosselman vs. US, 239 Fed. 82, 85; 152 CCA 132; Holmgren vs. US, 217 US 509, 513; 54 L. Ed. 861, 863.

4. Concerning the fourth question raised herein it is petitioner's earnest contention that the trial court erred when it asked the jury to consider factors outside the evidence in judging the matter, that is the cost of the trial and the possible cost of a new trial. Following the instruction given by the court without prior consultation with defense counsel as set forth in the Court of Appeals' opinion in the margin of page three, the jury retired at 3:08 p. m. and returned with a verdict on three counts at 4:28 p. m. To say that no proper objection was interposed to the questioned instructions is again begging the question because the court after instructing the jury immediately directed the jury to retire and recommence their deliberations. A general objection was thereupon interposed.

This instruction should not have been given.

Peterson vs. US, 213 Fed. 920, 924; Brasfield vs. US, 272 US 448, 449; 71 L. Ed. 345, 346; Campbell vs. US, 221 Fed. 186, 188; Rubenstein vs. US, 227 Fed. 2d 638, 642; Briggs vs. US, 221 Fed. 2d 636, 638.

CONCLUSION

Petitioner earnestly contends that the decision herein conflicts with other decisions heretofore rendered by the Courts of Appeal and that questions were not settled which should be settled by the United States Supreme Court and that the trial court departed from the accepted and usual course of judicial proceedings in the trial below. It is therefore, petitioner's contention, that pursuant to rule 19B of the Federal Rules of Criminal Procedure, that a writ of certiorari should be granted.

Frank Strangway

FRANK STRANGWAY
P O Box 3072
San Diego 3, California

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK STRANGWAY, Appellant,	)	
vs.	)	No. 18,160
UNITED STATES OF AMERICA, Appellee.	)	Jan. 8, 1963

Appeal from the United States District Court for the Southern District of California, Southern Division

---

Before: CHAMBERS, HAMLEY and MERRILL, Circuit Judges

HAMLEY, Circuit Judge:

Frank Strangway was convicted and sentenced, on a jury verdict, on count five of a twelve-count indictment charging violations of 26 U.S.C. § 7206 (2),

Internal Revenue Code of 1954.[1] Under count five Strangway was charged with having, on February 27, 1959, wilfully and knowingly aided and assisted in, and counseled, procured and advised the preparation and presentation of a false and fraudulent income tax return of Ramona E. Rodriguez for the year 1958. Appealing to this court, Strangway contends that the district court erred in several different respects.

First, appellant contends that the verdict is contrary to the evidence and the trial court therefore erred in failing to dismiss at the close of the Government's case, and in failing to direct a verdict of acquittal.

The Government argues that appellant designated only a portion of the evidence for inclusion in the record on appeal and that, for this reason, we may not pass upon the question of the sufficiency of the evidence. Appellant has not contradicted the Government's assertion that only a partial transcript has been filed.[2]

---

[1] § 7206. "Fraud and false statements

"Any person who --

. . .

"(2) Aid or assistance.--Wilfully aids or assists in, or procures, counsels, or advises the preparation of presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . ."

[2] Appellant filed no reply brief and did not offer oral argument.

The Government's position is correct. Where only a partial transcript of the evidence is included in the record on appeal, the sufficiency of the evidence cannot be evaluated. Donaldson v. United States, 9 Cir. 248 F.2d 364, 367.

Second, Strangway contends that the trial court erred in rejecting his offered instruction to the effect that if the evidence is susceptible of two reasonable constructions or interpretations, one of which points to guilt and the other to innocence, the jury must adopt that interpretation which points to innocence.

Strangway does not argue this point in his brief. Nor did he object in the trial court to the failure to give this instruction, as required under Rule 30, Federal Rules of Criminal Procedure. For these reasons we decline to consider this contention on the merits.

Third, appellant contends that the trial court erred in rejecting his offered instruction to the effect that the jury may not convict on circumstantial evidence alone, unless the proved circumstances are not only consistent with the hypothesis of guilt, but are irreconcilable with any other rational conclusion.

The proposed instruction is not in accord with the currently-accepted rule in the federal courts. See Holland v. United States, 348 U.S. 121, 139-140; Bolen v. United States, 9 Cir., 303 F.2d 870, 874.

Fourth, appellant contends that the jury should have been instructed on the evaluation of the testimony of an accomplice. This point is not mentioned in appellant's specifications of error relied upon, as required

by Rule 18(d) of the rules of this court. Under that rule, if appellant proposed an instruction on the subject he should have set it out totidem verbis in such a specification, together with the grounds of the objection urged at the trial to the court's refusal to give the instruction. If he did not so object, he is not entitled to raise the question in this court, unless we notice the matter as a plain error or defect affecting substantial rights. Rule 30, Federal Rules of Criminal Procedure, 18 U.S.C.A., Baker v. United States, 9 Cir., ____ F.2d ____, decided November 20, 1962.

It would appear from the portion of the record cited by appellee that the trial court asked counsel for appellant if he had any objections to the instructions given or refused, and that counsel indicated an objection only with regard to the refused instruction on circumstantial evidence. Appellant has not asked us to notice this matter as plain error but, in any event, we hold that it did not constitute plain error.

Fifth, appellant contends that in giving the instruction quoted in the margin, the trial court erroneously coerced the jury into bringing in a verdict, and asked it

to consider factors outside the evidence.[3]

The objection taken to the giving of this instruction was not adequate as it failed to state a ground for the objection. But, proceeding to the merits, the questioned instruction is almost identical with an instruction given in United States v. Kawakita, S.D. Cal., 96 F. Supp. 824, 855-856, which instruction was approved by this court on appeal. Kawakita v. United States, 9 Cir., 190 F.2d 506 521-528. In our view the giving of this charge was not, under the circumstances of this

---

[3]The instruction in question reads:

"Ladies and gentlemen of the jury, while there have been numerous exhibits in this case, and quite a bit of testimony, as a matter of fact, this case is not difficult. There is nothing factually difficult about this case at all, and I do not understand why you are unable to reach a verdict.

"The facts, as I said before, are quite simple. It has been carefully presented, and I want to suggest a few thoughts which you may desire to consider in your deliberations along with all the evidence and all the instructions previously given to you.

"This is an important case. The trial has been expensive to both the prosecution and the defense. If you fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of some time. There appears no reason to believe that another trial would not be equally expensive to both sides. Nor does there appear any reason to believe that the case can be tried any better or more exhaustively than it has been, on either side. Any future jury must be selected in the same manner and from the same source as you have been chosen. . . ."

"Of course these matters suggest themselves upon brief reflection to all of us who have sat through this trial. The only reason they are mentioned is because some of them may have escaped your attention, which must have been fully occupied up to this time in reviewing the evidence . . ."

circumstances relied upon by appellant present no constitutional problem.

The judgment is affirmed.

(Endorsed) Opinion Filed Jan. 8, 1963.

Frank H. Schmid, Clerk.